NO. 22607

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH, Appellant, vs. THE JAMES IRVINE FOUNDATION, a corporation, et al., Appellees.	)

Appeal from the United States District Court

Central District of California

PETITION FOR REHEARING

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To the Honorable John C. Pickett, Austin L. Staley and Warren L. Jones, Circuit Judges:

Appellant, Athalie Irvine Smith, hereby petitions for a rehearing to reconsider the judgment entered in this action on October 14, 1968, on the following grounds:

1. The judgment entered herein by the District Court and the judgment of the Court of Appeals affirming the judgment of said District Court and entered herein on October 14, 1968, was and is void for want of jurisdiction and due process because of the absence of an

indispensable party to plaintiff's action, to wit: James Myford Irvine, who was born in 1953, and is an heir at law of the trustor James Irvine, deceased, who was the grandfather of said minor.

2. The judgment of the District Court and the judgment of the Court of Appeals violates the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution. The judgment of the Court of Appeals must therefore be vacated and the judgment of the District Court must likewise be vacated, reversed, and remanded to the District Court with instructions to grant the plaintiff a new trial and with further instructions to appoint an independent guardian ad litem for the minor heir at law, James Myford Irvine, who is an indispensable party to the plaintiff's action. Rule 17 (c) F.R.C.P.

Other grounds for granting said petition for rehearing will be hereinafter set forth:

1. James Myford Irvine was born in the year 1953 and was a minor of the age of 13 years when the plaintiff filed her action herein on August 10, 1966. As hereinabove stated, James Myford Irvine is an heir at law of the trustor, James Irvine, deceased, who was the grandfather of said minor. James Irvine, deceased, died on August 24, 1947. The father of the minor James Myford Irvine was Myford Irvine, deceased, a son of the trustor, James Irvine, deceased. Myford Irvine died on January 11, 1959. The minor James Myford Irvine was

and is an indispensable party to plaintiff's action as an heir at law of the trustor James Irvine. A guardian ad litem should have been appointed by the District Court for said minor and joined as an indispensable party to plaintiff's action in the order of the District Court joining certain indispensable parties to said action, which was filed by said court on March 30, 1967. Said order joined Linda Irvine Gaede, a sister of said minor and a granddaughter of the trustor, James Irvine, as a party defendant in said action because said Linda Irvine Gaede as an heir at law of the trustor James Irvine was an indispensable party to said action. Likewise, said minor heir at law, James Myford Irvine, who stood in exactly the same relationship to the trustor, James Irvine, as his sister Linda Irvine Gaede, should have been included in said order of said District Court as an indispensable party to said action. He was not. Therefore, the District Court was without jurisdiction to proceed to the trial of said action or to enter a judgment therein and said judgment of said District Court is therefore void and the judgment of the Court of Appeals which affirmed the judgment of said District Court is likewise void.

Plaintiff's original Complaint alleged in paragraph 8, page 3 thereof, that the plaintiff and Katharine Irvine Wheeler, Linda Irvine Gaede, and James Myford Irvine were the granddaughters respectively and the grandson of the trustor, James Irvine, and were also the only heirs at law

of said James Irvine.

In paragraph 17, page 6 of said original Complaint, the plaintiff alleged, "That because of the invalidity of said instrument entitled 'Indenture of Trust' as hereinabove alleged, the defendant, The James Irvine Foundation, and the individual defendants named herein as the members and directors thereof, now hold the title to the said 459 shares of stock of The Irvine Company and all dividends, capital gains, liquidating dividends, and all other property derived therefrom on a resulting trust for the heirs at law of said James Irvine, deceased."

During the hearing before the District Court on the motion of defendant Foundation for summary judgment or dismissal of plaintiff's original Complaint and because of the contention of said defendant Foundation that the defendant as an heir at law of the trustor James Irvine did not have capacity to file her action herein and the District Court upon the request of plaintiff's counsel made an order which authorized the plaintiff to file an amended complaint herein to allege her status not only as an heir at law of the trustor James Irvine but also to show her status as a beneficiary, devisee and legatee under the Will of her grandfather, James Irvine, deceased. Accordingly, said Amended Complaint was filed on January 16, 1967, and contained the following allegation in paragraph 19, page 9 thereof: "Plaintiff brings this action as an heir at law of her

grandfather, James Irvine, deceased. Plaintiff also brings this action as a beneficiary, devisee, and legatee under the Will of her grandfather, James Irvine, deceased."
R. p. 12.

Said Amended Complaint further alleges as did plaintiff's original Complaint that James Myford Irvine was an heir at law and a grandson of the trustor James Irvine.
R. pp. 6-7.

Plaintiff in said Amended Complaint also alleged in paragraph 17, page 6 thereof, "That because of the invalidity of said instrument entitled, 'Indenture of trust,' as hereinabove alleged, that defendant, The James Irvine Foundation, and the individual defendants named therein as the trustees, members and directors thereof, now hold the 459 shares of stock of The Irvine Company and all dividends, capital gains, liquidating dividends, and all other property and fruits derived therefrom on a resulting trust for the heirs at law of the said James Irvine, deceased, and/or the beneficiaries, devisees and legatees of the Will of James Irvine, deceased."
R. p. 9.

Said Amended Complaint in the second cause of action therein for declaratory judgment and in paragraph 3, page 22 of said Amended Complaint, alleged that the plaintiff claims for herself as an heir at law of the said James Irvine, deceased, and/or as a beneficiary, devisee, and legatee under the Will of James Irvine, deceased, that the said 459 shares

of The Irvine Company stock was not owned by the defendant, The James Irvine Foundation, but that said 459 shares of stock is owned by the heirs at law of the said James Irvine, deceased, under the laws of succession and intestacy of the State of California and/or as beneficiaries, devisees, and legatees and that the plaintiff's share of said 459 shares of stock of The Irvine Company is 153 shares thereof. R. pp.25-26

It is therefore clear from the plaintiff's original Complaint as well as her Amended Complaint that the plaintiff's action is based upon the principle of law that because of the invalidity of the 1937 Indenture of Trust that the defendant Foundation as trustee holds the 459 shares of Irvine stock for the heirs at law of the trustor, James Irvine, deceased. The Supreme Court of California in the case of Davenport v. Davenport Foundation, 222 P. 2d 11, 32 C. 2d 67, which was an action to invalidate an inter vivos trust upheld this principle of law upon which plaintiff's action is based. Further similar and applicable California authorities are:

Booge v. Reinicke, 114 P.2d 427, 45 C.A.2d 60; In re Estate of Walkerly, 41 P. 772, 108 Cal. 627; Campbell-Kawannanakoa v. Campbell, 92 P.184, 152 Cal. 201; In re Whitney's Estate, 167 P. 399, 176 Cal. 12; In re Maltman's Estate, 234 P. 898, 195 Cal. 643; Estate of Van Wyck, 196 P. 50, 185 Cal. 49; In re Estate of Bailess, 51 Cal.Rptr. 850; Atlantic Nat.Bk. of Jacksonville, Fla. v. St. Louis Union Tr.

Co., 221 S.W.Rptr. 2d 2.

The judgment of the District Court entered herein on December 18, 1967, states as follows: "4. That none of the heirs at law of James Irvine and none of the beneficiaries under his Will have any right or title to, or any interest in those shares." (The 459 shares of Irvine stock which are the subject of plaintiff's action). It is therefore clear that said judgment of the District Court excludes and prejudices the rights of said minor, James Myford Irvine, as an heir at law of the trustor James Irvine with reference to said minor's share as such heir of said 459 shares of the stock of The Irvine Company when the District Court never had jurisdiction over the person of said minor as an indispensable party to plaintiff's action.

The judgment entered herein by the District Court contains the following statement: "The stock involved (459 shares of The Irvine Company) constitutes the majority of The Irvine Company. (Total shares issued 855). That corporation has large assets. Its largest asset is a tract of land known as the Irvine Ranch. That ranch consists of approximately 88,000 acres of land in Orange County, California. It is in the metropolitan area of Los Angeles. Estimates of the present value of the ranch range from one-half billion dollars to a billion and one-half dollars." R. 139. The stake of the minor heir at law, James Myford Irvine, in the successful outcome of plaintiff's action would

be the value of his share of said 459 shares of Irvine stock, to wit, 76 1/2 shares thereof and his sister Linda Irvine Gaede would also receive 76 1/2 shares of said Irvine stock. On the basis of the estimated value of the Irvine Ranch as stated by the District Court as hereinabove mentioned, said 76 1/2 shares of Irvine stock would have a minimum value of approximately 38 million dollars and a maximum value of 114 million dollars. It is therefore obvious that said minor heir at law, James Myford Irvine, has a substantial interest in the subject matter and controversy that is involved in the plaintiff's action and that said minor heir at law was and is entitled to be joined as an indispensable party to plaintiff's action through an independent guardian ad litem who would be required to employ an independent attorney who would vigorously assert and protect the rights of said minor and who would not be associated with or controlled by any of the attorneys for the defendants in this action.

On February 22, 1967, the District Judge denied the motions of the defendant Foundation for summary judgment or dismissal and thereupon the defendant Foundation and the defendant Kate L. Wheeler made an application for an order joining parties defendant (FRCP Rules 12, 21) together with a memorandum of points and authorities and affidavit of Howard J. Privett in support thereof. Said application was exparte and was mailed to the District Judge who was on said date sitting on the District Court in San Antonio,

Texas by assignment. Said application stated: "This application is made upon the ground that each said proposed party defendant is a proper and necessary or indispensable party to this action and that the joinder of said parties is required to fully and finally resolve the pending controversy and to avoid subjecting those who are already parties herein to a substantial risk of a multiplicity of actions possibly involving inconsistent results. The proposed new parties, and each of them, can be joined herein as defendants without depriving this court of jurisdiction and each proposed new party is subject to the jurisdiction of this Court as to both services of process and venue." The names of each of said proposed parties to be joined as a defendant upon the ground that each of said parties was a proper and necessary or indispensable party to said action was Linda Irvine Gaede, granddaughter of the trustor, James Irvine, and therefore an heir at law of James Irvine. The other parties were Gloria Wood Irvine, the wife of Myford Irvine, but not an heir at law of the trustor James Irvine and not the mother of Linda Irvine Gaede. Connected with the joinder of Gloria Wood Irvine was the Security First National Bank, who with Gloria Wood Irvine was an executor and trustee of the estate of Myford Irvine, deceased. The remaining parties were William Thornton White, Jr., as executor of the estate of Katharine Brown Irvine, deceased, and the Attorney General of the State of California.

In said Memorandum of Points and Authorities in support of said motion to join certain persons as defendants, the following representation was made to the District Court: "The plaintiff has failed to name or join as parties defendant in this action heirs at law of James Irvine, deceased, beneficiaries of the estate of James Irvine, deceased, each of whose interests are adverse (false) to those of plaintiff (false) and will be affected (prejudiced) by any judgment entered herein." Said Memorandum of Points and Authorities contain the further statement: "The plaintiff brings this action as an heir at law of James Irvine, deceased, and as a beneficiary, devisee, and legatee under the Will of James Irvine, deceased."

Under the Will of James Irvine, deceased, and in Article Fifth, paragraph F, subparagraph 2 thereof, the plaintiff is a residuary devisee and legatee and is entitled to the distribution of one-third of any property that comes into the estate of James Irvine, deceased, subsequent to the distribution of said estate to the testamentary trustees who are named in said Will and said residuary provision would include the 459 shares of stock of The Irvine Company that is held by the defendant Foundation on a resulting trust in the event said Irvine stock became a part of the said estate, as a result of plaintiff's action. Said Irvine stock would be distributed outright to plaintiff and the other heirs at law of James Irvine, deceased, and would not be subject to any

of the trust provisions of the Will of said decedent.

Plaintiff further contended and the substantial evidence introduced at the trial disclosed that James Irvine died intestate as to the 459 shares of Irvine stock and therefore the plaintiff and the other heirs at law of James Irvine would be entitled to the distribution of said stock as such heirs and the same would not come under the trust provisions of the Will of James Irvine, deceased. However, none of these issues were considered by the District Court and no findings thereon were made by the District Court. Said joinder memorandum further stated: "Plaintiff's position in the action is in direct conflict with the interests of the other persons who are heirs at law and/or beneficiaries under the estate of James Irvine, deceased." (False). "A judgment herein would necessarily affect the rights of said persons (true) and if they are not joined as parties, the persons who are already parties would be subject to a substantial risk of a multiplicity of actions involving the same subject matter with possibly inconsistent results. (True). It is therefore necessary and proper that said parties be joined herein as parties defendant. Bank of California v. Superior Court, 16 Cal 2d 516, 106 P 2d 879. The same rule applies in the federal courts. Beard v. Peoples Bank and Trust Co. of Westfield, 120 F.2d 1001 (3rd Circuit 1941); Warner v. First National Bank of Minneapolis, 236 F.2d 853 (8th Circuit 1956); Certiorari denied

352 U.S. 927."

Said memorandum contained the further statement: "Plaintiff is on record as having no objection to the proposed parties defendant who are necessary parties to this action (including Linda Irvine Gaede and the minor heir at law, James Myford Irvine) and has acknowledged that their joinder may be ordered without the necessity of a hearing as appears in the following extract from the reply of plaintiff to answers of all defendants to the Amended Complaint except The Irvine Company." To wit:

"The plaintiff has heretofore indicated to the court the plaintiff has no objection to the joining in this action of any parties whose interests are involved in said action and may be affected by any judgment entered herein and who appear to the court to be necessary or indispensable parties to this action as provided in Rules 19 and 21 of the Federal Rules of Civil Procedure whenever the court shall determine of its own motion that said parties, who ever they may be, shall be so joined." Emphasis added, p.16, l.11-18, Plaintiff's Reply to Answers of said Defendants. R.101.

The Affidavit of Howard J. Privett referred to in said joinder motion contained the following statement: "2. That the records, pleadings and files herein disclose that Linda Irvine Gaede is an heir at law of James Irvine, deceased, and a beneficiary of the estate of James Irvine, deceased."

Having represented to the District Court that it was necessary to join Linda Irvine Gaede, who was an heir at law of James Irvine, deceased, and therefore an indispensable party to plaintiff's action and not to join her minor brother James Myford Irvine, who was also an heir at law of James Irvine, deceased, indicated that there was some reason why the defendant Foundation and the defendant Kate L. Wheeler, as the moving parties, did not intend that the minor heir at law, James Myford Irvine, be made an indispensable party as a defendant to plaintiff's action the same as his sister Linda Irvine Gaede was. However, the reason for doing so is obvious. Said defendants did not intend that said minor heir at law, James Myford Irvine, would become a party to this proceeding because to do so would have required the court to appoint a guardian ad litem for said minor heir at law and also to appoint said guardian ad litem's attorney in order that the rights and interests of said minor heir at law would be faithfully and adequately protected. All of the other parties defendant who were brought into said action on said joinder motion (except the defendant Linda Irvine Gaede) as well as the original parties who were named in the original Complaint and the Amended Complaint of the plaintiff were and are hostile and adverse to the rights and interest of said minor heir at law and for that reason they too did not intend that said minor heir at law would be represented in plaintiff's action by an independent guardian ad litem

and by an independent attorney who would not be subject to the control of said other defendants and their attorneys.

The record in this case, including the briefs filed by said activist defendants conclusively established the hostile and adverse position of said defendants not only against the claims of the plaintiff but also against the constitutional rights and interests of said minor heir at law, James Myford Irvine. It therefore appears that the failure to join said minor heir at law, James Myford Irvine, as an indispensable party to plaintiff's action was both sinister and ulterior. There can be no other explanation for said willful failure to do so in the face of the inclusion in said joinder motion of Linda Irvine Gaede as an indispensable party to plaintiff's action and the deliberate exclusion of her brother and minor heir at law, James Myford Irvine.

There is only one trust involved in plaintiff's action and that is the resulting trust that arises as a matter of law because the trust created by the 1937 Indenture of Trust is invalid and void. The defendant Foundation and the individual defendant directors and trustees of said defendant Foundation, as the trustees of said resulting trust, hold the 459 shares of Irvine stock on a resulting trust and not as trustee under the Irvine Indenture of Trust. The beneficiaries and the only beneficiaries of said resulting trust are the heirs at law of James Irvine, deceased, to wit: Athalie Irvine Smith, the plaintiff, Katherine

Lillard Wheeler, a defendant, Linda Irvine Gaede, a defendant, and the minor heir at law, James Myford Irvine, who should be joined as an indispensable party to plaintiff's action but who was not for the reasons hereinabove stated. Neither the estate of James Irvine, deceased, or the estate of his widow, Katharine Brown Irvine, deceased, or Gloria Wood Irvine and Security First National Bank, as executors and trustees of the estate of Myford Irvine are beneficiaries of this resulting trust.

There is no reason why the District Court or this court should not have observed from the disclosures made by the plaintiff in both her Complaint and Amended Complaint and in her briefs filed with both the District Court and this court that the status of the minor heir at law, James Myford Irvine, required said District Court and this court to take appropriate action which would have resulted in making said minor heir at law a party to this action. Having failed to do so, and having been misled through the fraudulent acts and conduct of said activist defendants as hereinabove mentioned, the judgment entered by the District Court and the judgment entered by this court are both void and therefore the judgment of the District Court must be vacated, reversed, and remanded to the District Court for a new trial with instructions to said District Court to appoint an independent guardian ad litem and an independent attorney for said guardian ad litem who will vigorously

assert and protect the constitutional rights of said minor heir at law, James Myford Irvine, to due process of law and to have his day in court.

The opinion of the Court of Appeals for the Third Circuit in the case of Provident Tradesmens Bank & Trust Co. etc., v. Lumbermens Mutual Casualty Company, etc., reported in Volume 365 F.2d 802, contains a comprehensive legal treatise covering many federal cases involving the law that is applicable to the record facts in the plaintiffs case which required the mandatory joinder of said minor heir at law, James Myford Irvine, as an indispensable party to plaintiff's action. In the appendix to this Petition for Rehearing, there is set forth certain verbatim portions of said opinion of the said Court of Appeals for the Third Circuit which enumerates and quotes from said applicable federal cases.

The plaintiff is aware of the decision of the United States Supreme Court in the above case which is reported in 19 L.Ed. 2d 936 and the criticism of the Supreme Court concerning the opinion of the Court of Appeals in said case. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for its consideration of certain issues raised on the appeal from the District Court which said opinion of the Supreme Court stated were not considered by the Court of Appeals. Judge Staley was a member of the en banc panel that heard

this appeal and Judge Staley is therefore familiar with both opinions. However, the Supreme Court in its lengthy opinion did not overrule or criticize any of the cases applicable to the law concerning the joinder of indispensable parties as provided in Rule 19 FRCP but to the contrary the Supreme Court approved all of said federal authorities which were set forth in said opinion of the Court of Appeals and which have been referred to and quoted from in this Petition for Rehearing. What the Supreme Court criticized in the opinion of the Court of Appeals for the Third Circuit was that said court failed to apply Rule 19's criteria to the facts of the case that was under consideration by said Court of Appeals and that if it had done so, said Court would not have reached the conclusions it did. The facts established by the substantial evidence in plaintiff's case clearly disclose the status of said minor heir at law as an indispensable party to plaintiff's action and therefore the federal cases cited in the opinion of the said Court of Appeals as well as the other cases which are cited in the notes appended to the opinion of the Supreme Court clearly affirm that the failure to name the minor heir at law, James Myford Irvine, as an indispensable party to plaintiff's action renders the judgment of the District Court and the judgment of this court void and requires that both of said judgments be vacated and that the judgment of the District Court be reversed and remanded for a new trial.

In addition to the federal cases cited in the opinion of the Court of Appeals for the Third Circuit and in the opinion of the Supreme Court, the following federal cases support the plaintiff's Petition for Rehearing, to wit:

Wesson, et al. v. Crain, 8th Circuit, 165 F.2d 6; Division 525, Order of Railway Conductors of America v. Gorman, 8th Circuit, 133 F.2d 273; Stevens v. Loomis, 1st Circuit, 334 F.2d 775; Cummings v. Redeeriaktieb Transatlantic 3rd Circuit, 242 F.2d 275; Haby v. Stanolind, 5th Circuit, 225 F.2d 723; Brown v. Christman, 126 F.2d 625.

Two cases of the Court of Appeals for the 9th Circuit that have a direct bearing on the plaintiff's Petition for Rehearing are McShan v. Sherrill, 233 F.2d 462 and The Dredge Corporation v. Penney, 338 F.2d 456. The Court of Appeals for the 9th Circuit in both of said cases held that the failure to join an indispensable party can be raised at any time, even by the Court of Appeals on its own motion.

The Supreme Court in its opinion in the Provident case stated that the mandatory duty which is imposed by the law on a Court of Appeals involving the absent indispensable party such as the minor heir at law, James Myford Irvine, is as follows:

> "When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of

course had no opportunity to plead and prove his interest below."[8] Pages 945, 946.

Footnote 8, page 946, reads as follows:

"8. E. g., Hoe v. Wilson, 9 Wall 501, 19 L ed 762. See generally 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1966 Supp) (Wright ed)."

It is therefore clear that both of the above authorities referred to by the Supreme Court in footnote 8 are approved by the Supreme Court. We have already quoted from the case of Hoe v. Wilson. (Appendix). That portion of § 762, Barron & Holtzoff that is applicable to plaintiff's Petition for a Rehearing reads as follows:

"§516. Effect of Failure to Join; Jurisdiction as Affected by Joinder.

In considering what action an appellate court should take when it is urged to vacate the proceedings below and to dismiss for want of an indispensable party, three situations must be distinguished. (1) The judgment purports to affect prejudicially the interest of an absent indispensable party, and the objection is raised for the first time on appeal. * * *

"In situation (1) the action must be dismissed, or remanded to bring in the absent parties. This is the classic illustration

of the rule that the objection of failure to join an indispensable party may be raised for the first time on appeal."[34.1a] * * *

(The footnote 34.1a reads as follows: "This was the situation in the leading case of Hoe v. Wilson, 1870, 76 U.S. (9 Wall.) 501, 19 L.Ed. 762. See also McShan v. Sherrill, C.A.9th, 1960, 283 F.2d 462)".

"The results in these situations must be considered in terms of the purposes of the compulsory joinder rule. That rule is intended to protect the absentee from prejudice. * * * For the first of these purposes, timely objection of the parties is immaterial. If the absentee will otherwise suffer prejudice, the court must act on its own to protect him, and this is why the appellate court must reverse in situation (1)."

The plaintiff by the disclosure in her original Complaint and her Amended Complaint and in her briefs filed with the District Court after the trial in said court brought to the attention of said District Court the names of all of the heirs at law of James Irvine, deceased, and who were also beneficiaries, devisees and legatees under the Will of said deceased, including the minor heir at law, James Myford Irvine. In the Reply filed by the plaintiff to the affirmative defenses contained in the answers of the

activist defendants, the plaintiff alleged as set forth in the Memorandum of Points and Authorities to the joinder application of the defendant Foundation and the defendant Kate L. Wheeler that the plaintiff had no objection to the joining in plaintiff's action of any parties whose interests were involved in said action and that may be affected (prejudiced) by any judgment entered therein and who appear to the District Court to be necessary or indispensable parties to said action as provided in Rule 19 FRCP whenever said court should determine of its own motion that said parties, who ever they may be shall be so joined. R. 101.

It was, therefore, the duty of said District Court to know from the allegations and disclosures contained in said pleadings and said briefs of the existence of said minor heir at law, James Myford Irvine, and that it was mandatory for said District Court of its own motion to join said minor heir as an indispensable party to the subject matter and the controversy which was contained in plaintiff's original Complaint and Amended Complaint.

The District Court and this court were also charged with notice from the transcript of record in this case, including the 16 volumes of the reporters transcript and the briefs filed by the plaintiff that all of the activist defendants hereinabove mentioned who appeared in said action conclusively demonstrated by their pleadings, arguments and briefs filed in the District Court and in

this court that all of said activist defendants were not only hostile and adverse to the constitutional rights and interest of said minor heir at law, James Myford Irvine, in the subject matter and controversy contained in plaintiff's action but further that said hostile and adverse acts by said defendants were the result of collusion and connivance between said activist defendants which conclusively demonstrated that none of said defendants protected or intended to protect the constitutional rights to due process and the interest of said minor in the subject matter and controversy set forth in plaintiff's Complaint and Amended Complaint. It therefore appears from the record in this case that said activist defendants deliberately, willfully, and fraudulently excluded said minor heir at law, James Myford Irvine, from appearing and protecting his interests in plaintiff's action through a court appointed guardian ad litem. The defendants, N. Loyall McLaren and Robert H. Gerdes, who were named as original defendants in plaintiff's action as members, directors and trustees of the defendant Foundation and who were further joined as defendants in said action pursuant to their application as executors and trustees of the estate of James Irvine, deceased, fraudulently betrayed and abandoned their fiduciary trustee responsibility to said minor and assumed a hostile, adverse and fraudulent conflict of interest position towards said minor to whom they owed a trustee fiduciary responsibility as a matter of law. Said defendants

N. Loyall McLaren and Robert H. Gerdes subordinated their fiduciary duty which they owed said minor as trustee of the estate of James Irvine, deceased, to their predominant conflict of interest status as members, directors, trustees, and officers of the defendant, The James Irvine Foundation. Two of the other activist defendants who were joined in said action pursuant to said application for joinder also abandoned their fiduciary trustee responsibility to said minor as executors and trustees of the estate of Myford Irvine, deceased, and throughout this litigation said parties asserted an adverse, hostile and conflict of interest position against their beneficiary, to wit, James Myford Irvine, a minor, who as a beneficiary under the Will of his deceased father, Myford Irvine, was entitled as a matter of law to look to said trustees to protect his constitutional rights to due process and his substantial interests as a beneficiary of said resulting trust. The hostile, adverse and conflict of interest briefs filed by said fiduciary trustees of said minor with the District Court and this court constitutes a deliberate breach of the fiduciary obligations said trustees owed to said minor.

It therefore appears conclusively from the record in this case which is before this Court of Appeals that said minor heir at law, James Myford Irvine, as an absent indispensable party to plaintiff's action was not protected or represented in said action by a single defendant in this

case but to the contrary the interests and constitutional rights of said minor heir at law were ruthlessly defeated by the hostile and adverse conduct and fraud of each of said activist defendants towards said minor.

The judgment of the District Court and the judgment of this Court of Appeals are void because said judgments violate the due process clause of the Fifth and the Fourteenth Amendments to the United States Constitution for the reason that the District Court and this court were both without jurisdiction over the person of said minor heir at law, James Myford Irvine, to enter their respective judgments herein. Plaintiff invokes both the Fifth and Fourteenth Amendments to the United States Constitution in support of this appeal and in support of this Petition for Rehearing. Hanson v. Denckla, 357 US 235, 2 L.ed 2d 1283, 78 S Ct 1228, citing Pennoyer v. Neff, 95 US 714, 24 L.ed 565.

The District Court in plaintiff's action never acquired jurisdiction over the person of the indispensable party minor heir at law and/or beneficiary under the Will of James Irvine, deceased. The judgment of the District Court and the judgment of this court therefore are in violation of the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution which renders said judgments void.

Plaintiff has set forth in the appendix to this Petition for Rehearing certain applicable excerpts of the

law pertaining to indispensable parties in federal court actions which are taken from that eminent authority on Federal Practice, to wit, Moore's Federal Practice 2nd Edition 3A, commencing with Chapter 19 entitled, "Joinder of Persons Needed for Just Adjudication, recompiled in 1967 to include the 1966 revision of Rule 19 FRCP."

The opinion herein of this court states: "Jurisdiction in the district court was thus invoked under 28 U.S.C. Section 1332 and was based upon diversity of citizenship. It is undisputed that the law of California applies."

The law of California agrees with the federal cases referred to in this Petition for Rehearing with reference to the mandatory joinder of indispensable and necessary parties.

The Supreme Court of California in a landmark decision in California, to wit, Bank of California Nat. Ass'n. v. Superior Court in and for the City and County of San Francisco, 16 C 2d 510, 196 P 2d 879, cited by defendant Foundation and defendant Kate L. Wheeler in their Memorandum of Points and Authorities in support of their joinder application, states the law in California that is applicable to appellant's Petition for Rehearing as follows:

> "First, then, what parties are indispensable? There may be some persons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action. Typical are the situations where a number of

persons have undetermined interests in the same property, or in a particular trust fund and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him. The other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights." Emphasis added.

Other applicable California authorities are: Hartman Ranch Co. v. Associated Oil Co. 73 P 2d 1163, 1179, 1180, 10 C 2d 1082; Guerra v. Packard, 16 Cal.Rptr. 25, 39; California Water Serv. Co. v. Edward Sidebotham & Son, Inc., 37 Cal.Rptr. 1, 10; Miracle Adhesives Corporation, et al., v. Peninsula Tile Contractors' Association, et al., 321 P 2d 482, 483, 484, 157 CA 2d 591.

2. It is inconceivable to the plaintiff that this court will deny plaintiff's Petition for Rehearing for to do so would violate the mandate contained in the decisions of the United States Supreme Court in the recent cases of Provident, et al. v. Patterson, supra, and Hanson v. Denckla, supra, and including the other cases of the United States Supreme Court which are referred to in both of the above Supreme Court

decisions and many other federal cases which are likewise referred to in said Supreme Court decisions. As stated by the United States Supreme Court in the case of Hanson v. Denckla, there is not only a question of jurisdiction that is involved in plaintiff's appeal and in her Petition for Rehearing but further there are constitutional rights involved based upon the due process clause of the Fifth and the Fourteenth Amendments to the United States Constitution. Plaintiff therefore believes that this Court of Appeals will observe the mandate of the United States Supreme Court and grant the plaintiff's Petition for Rehearing and vacate the judgments of the District Court and this court and reverse and remand the judgment of the District Court with instructions to grant the plaintiff a new trial. However, the plaintiff feels that the opinion of the Court of Appeals in the present case is so devoid of the consideration which the plaintiff's case was entitled to have by this court that said opinion of this court is a gross miscarriage of justice which constitutes a denial to the plaintiff of her constitutional rights to due process and to have her day in court in a Court of Appeals as provided in the Fifth and the Fourteenth Amendments to the United States Constitution.

No consideration whatever is given by this court in its opinion to any of the substantial issues of fact and law which are raised by the plaintiff in her briefs that were filed with this court. Said issues were supported by

many decisions of the Supreme Court and the Appellate Courts of California as indicated by the many California cases that were not only cited by the plaintiff in said briefs but which were also quoted from in said briefs and the appendices thereto. Particularly, the recent case of Lawson v. Lowengart, 59 Cal.Rptr. 186, which upholds the contention of the plaintiff that neither the Irvine stock or the Indenture of Trust involved herein were legally delivered by James Irvine to defendant Foundation as trustee. The opinion of this court makes no reference whatever to the California cases that plaintiff brought to the attention of this court with reference to the legal requirements necessary to the legal delivery of a gift inter vivos. The summary opinion of this court is apparently based upon the court's terse statement as follows: "In our view, appellant has failed to carry her burden in this respect and after considering her assertions and after thoroughly examining the voluminous record in this appeal, we are far from a definite and firm conviction that a mistake has been committed. To the contrary, we are not in the slightest convinced that the District Court's findings are erroneous -- clearly or otherwise, consequently those findings will not be disturbed." Beyond this general reference to findings, no consideration whatever is indicated in the opinion of this court concerning the substantial and uncontradicted evidence introduced by the plaintiff and which clearly demonstrated that the

specified findings of the District Court as pointed out by the plaintiff in plaintiff's briefs are "clearly erroneous". Furthermore, this court misapplies the Gypsum decision of the United States Supreme Court to the undisputed facts in plaintiff's case as upholding the foregoing statement of this court. The fact is that the decision of the Supreme Court in the Gypsum case upholds the contention of the plaintiff that the findings of the District Court as indicated in the briefs of the plaintiff are "clearly erroneous". This court extracts from the Supreme Court opinion in the Gypsum case the following sentence which is taken clearly out of context, to wit: "It is said that a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." The Supreme Court in the Gypsum case held that the findings of the District Court were "clearly erroneous" which disposition of said case by the Supreme Court is not mentioned in the opinion of this court. The facts in the present case which make the findings of the District Court "clearly erroneous" are the identical evidentiary facts which the Supreme Court ruled made the findings of the District Court in the Gypsum case "clearly erroneous". The portion of said opinion of the Supreme Court in the Gypsum case which is applicable to the facts in the present case is as follows: "In so far as

this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside' unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or consitutional limitations on judicial review of findings by administrative agencies or by a jury, this court may reverse findings of fact by a trial court where 'clearly erroneous'". The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged had great weight with the Appellate Court. The findings were never conclusive however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

"The government relied very largely on documentary exhibits and called as witnesses many of the authors of the

documents. Both on direct and cross examination, counsel were permitted to phrase their questions in extremely leading form so that the import of the witnesses testimony was conflicting. On cross examination, most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involved mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot, under the circumstances of this case, rule otherwise than that Finding 118 is clearly erroneous." Emphasis added. Furthermore, the Supreme Court in the Gypsum case reversed the judgment of the District Court in favor of Gypsum and against the government. Exactly the same set of facts existed in the present case as the Supreme Court referred to in the Gypsum case. On the critical issue of legal delivery of the Irvine stock and the Indenture of Trust, the only evidence in the case introduced by the defendant Foundation was the oral testimony of defendants, N. Loyall McLaren and Robert H. Gerdes. McLaren testified that either James Irvine or Myford Irvine told him over the telephone or when he was in Mr. Irvine's office that the Irvine stock had been delivered to Myford Irvine and E. M. Price. Tr. p. 316. Gerdes likewise testified that in a conversation which he stated he held

with Mr. Irvine that he was told by Mr. Irvine that the Irvine stock had been delivered to Myford Irvine and E. M. Price. Tr. p. 1816. There is no evidence of any kind in the record that the Indenture of Trust was ever delivered to anybody. The plaintiff introduced in evidence contemporaneous documents which conclusively established as a matter of law that there was no legal delivery of either the Irvine stock or the Indenture of Trust to the defendant Foundation during the lifetime of James Irvine. These contemporaneous documents are all minutely described in the briefs of the plaintiff filed herein together with their exhibit numbers, and this documentary evidence conclusively established that the conflict between the testimony of N. Loyall McLaren and Robert H. Gerdes and the contemporaneous documents introduced by the plaintiff invoked in plaintiff's case the ruling by the Supreme Court in the Gypsum case that under similar circumstances which existed in the Gypsum case, the law is that the oral testimony of McLaren and Gerdes is entitled to little weight.

As jurisdiction of the District Court in this case was based upon diversity of citizenship, it is undisputed that the law of California applies. The plaintiff therefore calls the attention of the Court of Appeals to the rule of law in California which is applicable to the contention of the plaintiff that the findings of the District Court are not supported by the substantial evidence and that said

findings are therefore "clearly erroneous" is stated in the Supreme Court of California in the case of Herbert v. Lankershim, 71 P 2d 220, 9 C 2d 409 as follows:

> "We have stated the evidence as strongly in plaintiff's favor as the record will warrant, and we have made an extended review of the evidence because of the often applied rule that an appellate court will not interfere with the judgment entered by a fact-finding body when there exists a substantial conflict in evidence. This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence." * * *
>
> "There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney, et al., 97 Mont. 1, 33 P.(2d) 262, 266, correctly states the rule which has been approved by this court

in a number of our decisions. It is thus stated: 'While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court.'" * * *

* * * "The rule in cases such as the one before us is that the court must view the transaction with the 'most scrutinizing jealousy'. This means, of course, any court in which the issue may be raised. Oral evidence, of which there is no satisfactory independent corroboration, is the weakest kind of evidence known to the law."

The opinion of this Court of Appeals gives no consideration whatever to the substantial issues of fact and law which are involved in this appeal. According to the opinion of the District Court, which opinion is referred to in the opinion of this court, the 459 shares of Irvine stock which is the subject matter of plaintiff's action, is estimated at a minimum value of approximately 250 million dollars and a maximum value of approximately 750 million dollars. Under the circumstances, as well as the important issues of fact and law involved in plaintiff's appeal, it would appear that this Court of Appeals did not follow the California law as hereinabove stated by the Supreme Court of California.

Under California law, the defendant Foundation as the party holding the affirmative and asserting the validity of the gratuitous inter vivos gift in trust had the burden of proving the delivery, in the legal sense of the Irvine stock and the Indenture of Trust to the trustee. Blonde v. Jenkins, 131 C A 2d 682, 281 P 2d 214; Lawson v. Lowengart, 59 Cal.Rptr. 186, Bogert-Trusts, 2d Ed. Sec. 49, p. 391. The above cases and several others are cited by the plaintiff in her Opening Brief at page 23.

The basic issue and the undisputed facts in plaintiff's case are that neither the Irvine stock or the Indenture of Trust were legally delivered during the lifetime of James Irvine. The only evidence concerning said alleged delivery was the oral testimony of McLaren and Gerdes, both of whom testified that the alleged delivery of the Irvine stock was to Myford Irvine and E. M. Price. It is undisputed that both Myford Irvine and E. M. Price since 1917, the date of their original employment to the date of the death of James Irvine, in 1947, were the exclusive employees of James Irvine. It is, therefore, conclusive that the signatures on the Indenture of Trust of Myford Irvine and E. M. Price merely constituted the signatures of said parties as the employees and servants of James Irvine, who were carrying out the instructions of their employer that they sign said document. Although James Irvine placed his employee Myford Irvine as President and his employee E. M. Price as Secretary of the defendant

Foundation, does not change the law of master and servant which compelled a finding by the District Court that both Myford Irvine as President and E. M. Price as Secretary of said corporation served in said officer capacities as the employees and servants of James Irvine, and that he had the full control and dominion over each of them and their every act and deed regardless of their titles because he remained continuously, from February 24, 1937 to August 24, 1947, as their employer and master. Therefore, the alleged delivery of the Irvine stock and/or the Irvine indenture to said employees does not place either said stock or Indenture of Trust beyond the control of James Irvine during his entire lifetime. Without a legal delivery of the Irvine stock, there was never a legal execution of said Indenture of Trust.

The opinion of the California District Court of Appeals in the case of Lawson v. Lowengart, supra, which is referred to in plaintiff's Opening Brief at pages 23, 25 and 97 and in the appendix to said brief at pages 38, 39 and 49 states as follows: "The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession." This statement of the law in California is based upon two decisions of the Supreme Court of California, which were cited in the Lawson case, to wit,

Edwards v. Guaranty Trust, etc. Bank, 7 CA 86, 190 P 57, and Lefrooth v. Prentice, 259 P 947, 202 C 215. Under both of these cases, there could be no legal delivery of either the Irvine stock or the Indenture of Trust to Myford Irvine and E. M. Price as the illusory President and Secretary of the defendant Foundation so long as the relationship of master and servant existed between said parties and James Irvine, and this relationship existed during the entire lifetime of James Irvine both before and after the alleged execution of the Indenture of Trust on February 24, 1937. It therefore follows that there was no legal delivery of either said Irvine stock or said Indenture of Trust as a matter of law.

The applicable law to the uncontradicted evidence in plaintiff's case as laid down by the Supreme Court of California in the Edwards case above mentioned is as follows: "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly established, and the gift must be complete by actual, constructive or symbolic delivery without power of revocation. 20 CYC 1193. In order to accomplish this, 'there must be a parting by the donor with all present and future legal power and dominion over the property.' 20 CYC 1196; Tracy v. Alvord, 118 C 654, 59 P 757; Polland v. Placier County Bank, 138 C 169, 66 P 740, 71 P 83, 94 Am. St. Rep. 19; Simmons v. Savings Society, 31 Ohio 457, 27 Am. Rep. 521. That the law of this state is as stated in the Provident case, supra, will be seen by

a perusual of that and the other cases cited therein, citing and quoting from the California cases at length." (The Provident case referred to is entitled, Provident, etc. v. Sisters, etc. 87 N.J. Eq. 424, 100 Atl. 894). Emphasis added.

The case of Lefoorth v. Prentice, supra, was decided by the Supreme Court of California subsequent to the Edwards case and in referring to its prior decision in the Edwards case, the Supreme Court of California stated as follows: "A rehearing in this case (Edwards) was denied by the Supreme Court. A careful examination of many cases reveals no exception to the rule announced in the above authorities." (Cases referred to in the Edwards decision hereinabove set forth).

Again, it is therefore clearly established that under the law in California that the alleged delivery of the Irvine stock or the Indenture of Trust did not constitute a valid delivery under the circumstances and the uncontradicted substantial evidence in plaintiff's case as a matter of law; so long as the relationship of master and servant existed between James Irvine and Myford Irvine and E. M. Price, James Irvine could have recalled or demanded the return to him of said Irvine stock and said Indenture of Trust and in the event that such a demand had been made, said employees could not have refused as a matter of law to comply therewith and it matters not as to whether or not such a demand was made. Moore v. Trott, 104 P 578, 136 C 353, (Supreme Court).

The test of an effective delivery in such cases is the absolute relinquishment of recall and the irrevocability of the delivery of the trust property by the donor and so long as the relationship of master and servant existed between said parties, there was no absolute relinquishment thereof by James Irvine. There is, in other words, a pure question of law whether there was such an absolute delivery or not and under the California law the absolute control by James Irvine over his employees and servants Myford Irvine and E. M. Price leaves no question but that there was no legal delivery. Myford Irvine and E. M. Price were in privity with James Irvine. As his employees, they were required to do his bidding. There was no separate identity or legal trustee entity during the lifetime of James Irvine. Their agency to James Irvine or master and servant relationship was so close to James Irvine as their employer as to be held to be privy with him. Until he died, James Irvine possessed absolute power to revoke the alleged delivery of the Irvine stock and recall said stock and dispose of it as he pleased. He retained absolute control and dominion over the trust property. His employees, Myford Irvine and E. M. Price, being at the most mere custodians of the Irvine stock who were subject to his orders.

The defendant Foundation endeavors to confuse the issue of legal delivery by asserting that the validity of a trust is not affected by the trustor's reservation of power

to revoke. This contention is irrelevant to the issue of legal delivery. The question under the circumstances in the plaintiff's case is whether the gratuitous revocable and unenforceable transfer by the delivery to the employees of the trustor operated to vest title to the 459 shares of Irvine stock in the alleged trustee, during the lifetime of James Irvine, and not whether, if there had been a valid delivery of said Irvine stock to a bona fide trustee which had vested title in said trustee, the trust would be rendered invalid because the trust instrument contained a provision that empowered the trustor to thereafter revoke the trust. Before a trust can have any legal existence, there must be an execution of the trust. This involves three basic requirements: 1. Actual signing of the trust instrument by the trustor and a bona fide trustee. 2. Formal legal delivery to a bona fide trustee of the trust property or the trust instrument. 3. The actual administration of the trust during the lifetime of the trustor. Petition of Tuckerman, et al., etc., 60 NY Supp. 2d series 284. All three of said requirements are absent. The law in California as established in the Edwards case is that delivery of the trust property must be without power of revocation, "there must be a parting by the donor with all present and future legal power and dominion over the property". It is therefore inevitable that the relationship of master and servant between James Irvine and Myford Irvine and E. M. Price requires that judgment be entered for the plaintiff as a matter of law.

Undersigned counsel certifies that this Petiton for Rehearing is not interposed for delay and that in his judgment it is well founded.

DATED: November 18, 1968.

LYNDOL L. YOUNG
Attorney for Appellant
Athalie Irvine Smith

612 South Flower Street, Suite 650
Los Angeles, California 90017

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
(ss.
COUNTY OF LOS ANGELES)

DOROTHY M. ROUSH, being first duly sworn, deposes and says:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 612 South Flower Street, Los Angeles, California 90017; I served a copy of the attached PETITION FOR RE-HEARING on the following, by placing same in envelopes addressed as follows:

Gibson, Dunn & Crutcher,
634 South Spring Street,
Los Angeles, California 90014

Hall, Henry, Oliver & McReavy,
351 California Street,
San Francisco, California

Latham & Watkins,
615 South Flower Street,
Los Angeles, California

McCutchen, Black, Verleger & Shea
615 South Flower Street
Los Angeles, California 90017

Elden C. Friel, Esq.
235 Montgomery Street,
San Francisco, California.

Pillsbury, Madison & Sutro,
225 Bush Street,
Los Angeles, California.

Lillick, McHose, Wheat,
Adams & Charles,
600 South Spring Street,
Los Angeles, California 90014

Attorney General of the
State of California,
600 State Building,
Los Angeles, California
Attn: Carl Boronkay,
Deputy Attorney General

Said envelopes were then, on November 18, 1968, sealed and deposited in the United States mail at Los Angeles,

California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on November 18, 1968, at Los Angeles, California.

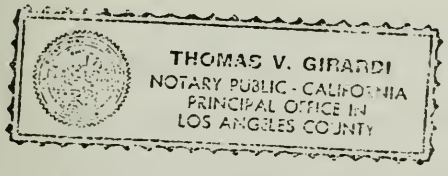
Dorothy M. Roush

DOROTHY M. ROUSH

Subscribed and sworn to before me this 18th day of November, 1968.

Thomas V. Girardi

Notary Public in and for said County and State.



APPENDIX

1. Portions of the Opinion of the Court of Appeals for the Third Circuit in the case of: Provident Tradesmens Bank and Trust Company, etc., et al. v. Lumbermens Mutual Casualty Company, etc., et al. 365 F.2d 802.

2. Excerpts from Moore's Federal Practice, 2nd Edition 3A, commencing with chapter 19 entitled, "Joinder of Persons Needed for Just Adjudication" (recompiled in 1967 to include the 1966 revision of Rule 19 F.R.C.P.).

ruling of the Tax Court is affirmed. As to the tax liability of Dr. Parker and F.D.M. the decision of the Tax Court is reversed only as to the issue of the legal fees and expenses paid by F.D.M. and taxed against Dr. Parker. The Commissioner filed a cross-petition "for protective purposes only in the event this Court decides that those items of income were not taxable to F.D.M." Since, we have decided that income to F.D.M. was taxable we need not consider the issues raised in the cross-petition. The case is remanded for recalculation of the tax and penalty due in accordance with the views expressed in this opinion.

Affirmed in part, reversed in part, remanded.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of John R. Lynch, Also Known as John Roberts Lynch, Deceased, (Plaintiff)

and

John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased (Party Plaintiffs)

v.

LUMBERMENS MUTUAL CASUALTY COMPANY and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased,

Lumbermens Mutual Casualty Company (Defendant), Appellant.

No. 14589.

United States Court of Appeals
Third Circuit.

Argued Oct. 6, 1964.

Reargued June 9, 1966.

Decided Aug. 30, 1966.

Action was brought for declaratory judgment that automobile was being operated by driver within scope of permission granted to him by insured when automobile collided with truck. The United States District Court for the Eastern District of Pennsylvania, Alfred L. Luongo, J., 218 F.Supp. 802, entered judgment adverse to insurer, and insurer appealed. The Court of Appeals, Kalodner, Circuit Judge, held that the action should have been dismissed because of failure to join insured, an indispensable party to the action, and because there were two pending state court actions presenting question as to coverage of automobile liability policy.

Judgment of District Court vacated, and cause remanded with directions to dismiss the action.

Freedman and Ganey, Circuit Judges, dissented.

1. Declaratory Judgment ⇐295

Insured under automobile liability policy was an "indispensable party" to action for declaratory judgment that insured's automobile was being operated by third person within scope of permission granted to him by insured when it collided with truck and that therefore automobile liability policy covered accident, and action should have been dismissed because of failure to join insured as party to the action. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure ⇐203

Party is an "indispensable party" when his rights may be affected, and court cannot proceed to final decision of cause until he is made a party.

3. Federal Civil Procedure ⇐203

Indispensable party doctrine is not procedural but declares substantive law and affords a substantive right, and therefore indispensable party doctrine is beyond reach of and not affected by Federal Rule of Civil Procedure dealing with necessary joinder of parties. Fed.Rules Civ.Proc. rules 12, 19, 28 U.S.C.A.

4. Federal Civil Procedure ⇐203

Equitable principles standing alone cannot be recruited to thwart or avoid impact of indispensable party doctrine, where a decree will have an injurious effect on interest of absent party.

5. Federal Civil Procedure ⇐203

Equitable considerations are an element of criteria to be applied in determining whether absent party is indispensable, but they are not operative where element of injurious effect on interest of such absent party is present.

6. Declaratory Judgment ⇐293

Declaratory judgment proceeding is not "equitable" within meaning of rule that "equitable" considerations are element of criteria to be applied in determining whether a party is indispensable. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

7. Declaratory Judgment ⇐168

Federal District Court should have denied relief by way of declaratory judgment, without consideration of merits, in action for declaratory judgment that insured's automobile, which was being operated by third person at time of collision with truck, was being operated within scope of permission granted by insured to third person and that therefore automobile liability policy covered automobile, where pending actions in state court, in which insured and all persons involved in accident were parties, presented question as to coverage of policy. 28 U.S.C.A. § 2201.

8. Declaratory Judgment ⇐5

Declaratory judgment is remedy committed to judicial discretion. 28 U.S.C.A. § 2201.

9. Declaratory Judgment ⇐392

Court of Appeals is not required to first have view of federal District Court before Court of Appeals may decide that judicial discretion ought not to be exercised in regard to grant of declaratory judgment. 28 U.S.C.A. § 2201.

Norman Paul Harvey, Philadelphia, Pa., for appellant.

Avran G. Adler, Philadelphia, Pa. (Abraham E. Freedman, Freedman, Landy & Lorry, J. Willison Smith, Jr., Bayard M. Graf, Philadelphia, Pa., on the brief), for appellees.

Before KALODNER, GANEY and FREEDMAN, Circuit Judges.

Reargued before STALEY, Chief Judge, and McLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, Circuit Judges.

KALODNER, Circuit Judge.

The instant declaratory judgment proceeding [1] was brought by Lynch's Estate [2] to determine whether the coverage of a public liability policy issued by the defendant, Lumbermens Mutual Casualty Company, to an owner of an automobile, one Edward S. Dutcher, extended to the deceased Donald Cionci, who was driving the car at the time it was involved in an accident. The policy by its terms extended its coverage to any person operating Dutcher's automobile with his permission at the time of the accident. The critical fact issue to be determined in the declaratory judgment action was whether the automobile was being operated by Cionci within the scope of the permission granted to him by Dutcher when it collided with a truck driven by one

1. The action is premised on Section 2201 of the Declaratory Judgment Act, 28 U.S.C.A. which provides in relevant part as follows:

"In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, *may declare the rights and other legal relations* of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a *final judgment or decree* and shall be reviewable as such." (Emphasis supplied.)

2. For simplicity, the name of the representative of the Lynch Estate, namely, Provident Tradesmens Bank and Trust Company, is omitted.

There is no precedent which affords nourishment to a contention that the indispensable party doctrine is nothing more than a procedural rule within the ambit of Rule 19.

It is true that several text writers have summarily treated the indispensable party doctrine as a procedural rule without considering whether it attains the proportion of substantive law. The existence of the threshold question as to whether the indispensable party doctrine is one of substantive law was, however, recently noted by Howard P. Fink, Research Associate, Yale Law School, in his article on "Indispensable Parties and the Proposed Amendment to Federal Rule 19." [4]

Exhaustive research has failed to yield a case in which the precise issue as to whether the indispensable party doctrine is one of substantive law has been raised or decided. However, Chief Judge Aldrich of the First Circuit in a recent case [5] noted *"the view that what are indispensable parties is a matter of substance, not of procedure."* (Emphasis supplied.)

Our view that the indispensable party doctrine is *substantive law*, according a *substantive right* to an absent party to be joined when his interests may be "affected by the decree", is premised on Russell v. Clark's Executors, supra, and the cases which declared the doctrine to be a "settled rule of equity jurisprudence", and the absence of an affected party as "fatal error", which must be recognized *sua sponte* by a trial court.

In Mallow v. Hinde, 12 Wheat. 193, 6 L.Ed. 599 (1827), which distinguished and limited to its facts, Elmendorf v. Taylor, 10 Wheat. 152, 6 L.Ed. 289 (1825), the Court in holding absent parties indispensable, said at page 198:

> "In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. *The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.*" (Emphasis supplied)
>
> "We do not put this case upon the ground of *jurisdiction, but upon a much broader ground.* * * * We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." (Emphasis supplied.)

In 1853, in Northern Indiana Railroad Company v. Michigan Central Railroad Company, 15 How. 233, 246, 14 L.Ed. 674, the Court, upon its finding that "It is impossible to grant the relief prayed, without deeply affecting the New Albany Company [which had not been joined]," declared:

> "* * * in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, *the court must refuse to exercise jurisdiction in the case,* or become the instrument of injustice." (Emphasis supplied.)

In 1854, this classic definition of an indispensable party was enunciated in the landmark case of Shields v. Barrow, 17 How. 130, at page 139, 15 L.Ed. 158:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either *affecting that interest,* or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (Emphasis supplied.) [6]

4. 74 Yale Law Journal 403, 430–431 (1965).

5. Stevens v. Loomis, 334 F.2d 775, 778, Note 7 (1 Cir. 1964).

6. In 1868, in applying the *Shields* doctrine, in Barney v. Baltimore City, 6 Wall. 280, 18 L.Ed. 825, the Court, after defining indispensable parties as those *"whose interests* in the subject-matter of the suit,

In 1870, it was ruled, in Hoe v. Wilson, 9 Wall. 501, 19 L.Ed. 762, that a court must *sua sponte* invoke the indispensable party issue even though it was not raised by a party.

There the Court said, at page 504:

"No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, *but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made.*" (Emphasis supplied.)

In 1874, the indispensable party doctrine was admirably epitomized in Williams v. Bankhead, 19 Wall. 563, 22 L.Ed. 184, in this statement (p. 571):

"Where a person will be directly affected by a decree, he is an indispensable party. * * *"

In the oft-quoted State of Washington v. United States, 87 F.2d 421 (9 Cir. 1936), there was enunciated what has now become landmark criteria in testing whether a party is indispensable, after it has been determined that he is interested.

The four-fold criteria there stated, at pages 427, 428, follows:

"(1) Is the interest of the absent party distinct and severable?

"(2) In the absence of such party, can the court render justice between the parties before it?

"(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

"(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that *all* of the four questions outlined above are answered in the *affirmative* with respect to the absent party's interest, then such absent party is a *necessary party*. However, if *any* one of the four questions is answered in the *negative*, then *the absent party is indispensable.*" (Emphasis supplied.)

It is important to note, that in its discussion of the indispensable party question, the Court said, at pages 427, 428:

"In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one * * *.

"[T]he nonjoinder of an indispensable party is *fatal error*, and the court *cannot* proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder *would oust the court of jurisdiction.* Neither the statute [Act of March 3, 1911, ch. 231 § 50, 36 Stat. 1101] nor the equity rule [Rule 39 of the Equity Rules of 1912, 28 U.S.C.A. following section 723], * * * permit the court to proceed in the absence of an indispensable party." (Emphasis supplied.)

The indispensable party doctrine as declared in *Shields* and *State of Washington* was applied in Commonwealth Trust Company of Pittsburg v. Smith, 266 U.S. 152, 45 S.Ct. 26, 69 L.Ed. 219 (1924) and Niles-Bement-Pond Company v. Iron Moulders' Union Local No. 68, 254 U.S. 77, 41 S.Ct. 39, 65 L.Ed. 145 (1920).

This court has time and again likewise done so.

In Samuel Goldwyn, Inc. v. United Artists Corporation, 113 F.2d 703

and *in the* relief sought, are *so bound up* with that of the other parties, that *their legal presence as parties* to the proceeding *is an absolute necessity*, without which the court cannot proceed," added this stricture:

"In such cases *the court refuses to entertain the suit*, when these parties cannot be subjected to the jurisdiction". (Emphasis supplied.) (p. 284.)

(1940), we held that an absent party is indispensable if his interest is "joint" with that of either plaintiff or defendant, and that the doctrine applies to declaratory judgment actions.

In Baird v. Peoples Bank & Trust Co. of Westfield, 120 F.2d 1001, 136 A.L.R. 693 (1941), we specifically held, citing *Shields* and *State of Washington*, that an absent party is indispensable, "if the decree will have an *injurious* effect upon his interest." We there affirmed the District Court's dismissal of a complaint in an action brought by life tenants insofar as it related to the corpus of a trust fund, for failure to join remaindermen who were found to be indispensable parties.

In United States v. Washington Institute of Technology, Inc., 138 F.2d 25 (1943), in affirming the District Court's dismissal of an action for nonjoinder of an indispensable party, we ruled that the requirement in Rule 19(a) that those who have a "joint interest" must be joined referred to parties who were "indispensable" prior to the Rule.

In doing so we said at pages 25–26:

> "Rule 19(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires that those having 'a joint interest shall be made parties * * *.' *This means those who were indispensable parties prior to the rules.* 2 Moore's Federal Practice (1938) § 19.02. As described in the leading case upon the matter, *they were persons who had such an interest that any final decree rendered had to affect that interest.* Shields v. Barrow, 1854, 17 How. 130, 15 L.Ed. 158." (Emphasis supplied.)

In Chidester v. City of Newark, 162 F.2d 598 (1947), we again declared (p. 600):

> "* * * *indispensable parties under Rule 19 are those who were indispensable prior to the rules;* they have such an interest in the controversy that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience." (Emphasis supplied.)

And, in Hook v. Hook & Ackerman, 187 F.2d 52 (1951), we stated in note 7, page 60:

> "Rule 19(a) uses the term 'joint interest', stating that those having such an interest 'must' be joined. *This provision applies to parties who were indispensable under the previous practice.*" (Emphasis supplied.)

The courts of appeals in other circuits have in recent years attested to the continuing unimpaired vitality of the indispensable party doctrine as declared in *Shields* and the Supreme Court cases which preceded and followed it.

In 1964, the First Circuit, in Stevens v. Loomis, 334 F.2d 775, declared (p. 777): *"where the interests of the absent party are inextricably tied in to the cause"* he is a *"true indispensable party"* and "A court *cannot proceed* in the absence of an indispensable party." (Emphasis supplied.)

Again, in 1964, the Fifth Circuit, in Hilton v. Atlantic Refining Company, 327 F.2d 217, in citing and applying Shields and Mallow v. Hinde, supra, declared (p. 218):

> *"An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights."* (Emphasis supplied.)

In 1961, the Ninth Circuit, in Stumpf v. Fidelity Gas Co., 294 F.2d 886, in holding that absent parties were not there indispensable because, inter alia, the judgment sought in the action *"would have no injurious effect upon the interest of any absent party"*, applied the criteria for testing whether an absent party is indispensable which had been laid

7. In *Stevens* it was held that the absent party was only a "necessary" party because it was not within the "classic definition of an indispensable party."

¶ 19.01—1. General Analysis; Relationship to Due Process, Other Principles, Rules and Substantive Law; Appraisal.

[1]—General Analysis.

Principles governing compulsory joinder of parties were a part of equity practice prior to any statute or rule on the subject.[1] Then in 1839 a statute was enacted, applicable to both law and equity, which partially dealt with the subject by providing for the omission of defendants who were "neither inhabitants of nor found within the district in which the suit is brought."[2]

Original Rule 19 was promulgated in 1937 and completely revised in 1966.[3] Much of original Rule 19(a) was to be found in Rule 37 of the Equity Rules of 1912; and the principle of original Rule 19(b) was incorporated into the Equity Rules of 1842 as Rule 47 and into the Equity Rules of 1912 as Rule 39.[4]

Although present subdivisions (a) and (b) of Rule 19 are quite different in statement and elaboration, their antecedents were subdivisions (a) and (b) of original Rule 19.[5] Present subdivision (c) parallels its predecessor subdivision (c);[6] and present subdivision (d) repeats the exception contained in the first clause of predecessor subdivision (a).[7]

Since the federal courts began functioning in 1789, the joinder of persons needed for a just adjudication has been the subject of hundreds of decisions, and also the subject of statute and rules. Because

[1] ¶ 19.19, *infra*.

[2] 28 USC § 111 (1940); see ¶ 19.19, *infra*; also ¶ 19.01[3], *supra*.

[3] ¶ 19.01, *supra*.

[4] ¶ 19.19, *infra*.

For original Rule 19, see ¶ 19.01 [2], *supra*.

[5] ¶ 19.05[1], *infra*.

Original subdivisions (a) and (b) dealt, respectively, with necessary joinder, and effect of failure to join. ¶ 19.01[2], *supra*.

Present subdivisions (a) and (b) deal, respectively, with persons to be joined, and determination by court whenever joinder not feasible.

[6] Original subdivision (c) was titled: "Same: Names of Omitted Persons and Reasons for Non-joinder to be Pleaded." ¶ 19.01[2], *supra*.

Present subdivision (c) is titled: "Pleading Reasons for Nonjoinder."

See ¶¶ 19.01-1[6], 19.20, *infra*.

[7] That the rule is subject to the provisions of Rule 23 dealing with class suits. ¶ 19.01[2], *supra*; ¶ 19.21, *infra*.

of this long tradition, the peculiar problems of federal judicial administration,[8] and other related reasons, the classification of parties is a federal matter, although intertwined with substantive law principles.[9] Revised Rule 19 does not break with its background tradition. It continues to deal with necessary and indispensable parties; and the latter concept of indispensability remains with us, for basically it is a part of due process and fair administration.[10] If these principles are borne in mind, revised Rule 19 is potentially a good rule in calling the courts' attention to factors and criteria, developed by the cases, that are important in classifying parties as either necessary or indispensable.[11]

[2]—Due Process and Indispensable Parties.

The Court in *Shields v. Barrow* [1] treated as indispensable "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience"; and ruled that an action must be dismissed if an indispensable party is not before the court.

The good sense underlying this case is based upon the following principles.

In *Western Union Telegraph Co. v. Commonwealth of Pennsylvania* [2] the Court held that a judgment of a Pennsylvania state court escheating certain intangible property in the hands of Western Union, where the Pennsylvania adjudication could not protect Western Union from having to pay twice since the Pennsylvania court could not secure jurisdiction over other states which might seek to escheat the same property (as New York had done as to part of the property),

[8] ¶ 19.04, *infra*.

[9] ¶¶ 19.01-1[3], [4], 19.07[1], *infra*.

[10] ¶¶ 19.01-1[2], [5], 19.07, 19.09, *infra*.

[11] ¶ 19.01-1[7], *infra*.

[1] (1854) 17 How 130, 139, 15 L ed 158 (see also ¶¶ 19.02, 19.05, 19.07, 19.10, 19.19, *infra*).

The quote from *Shields v. Barrow*, set forth in the text, is quoted by Chief Justice Warren in Lumbermen's Mut. Cas. Co. v. Elbert (1954) 348 US 48, 52, 75 S Ct 151, 99 L ed 59 (see ¶¶ 0.71[4.—6], 0.77[4], *supra*, for the *Elbert* case), and ¶ 19.07 *et seq.* of the Treatise cited.

[2] (1961) 368 US 71, 82 S Ct 199, 7 L ed2d 139.

denied Western Union procedural due process. And in *Hanson v. Denckla*[3] the Court held that a judgment of a state court that had not secured the requisite jurisdiction, in personam, quasi in rem or in rem, over a nonresident trustee deemed by state law to be an indispensable party, also violated due process.

A court cannot render a valid judgment binding upon a person over whom it has not obtained requisite jurisdiction, in personam, quasi in rem, or in rem, as the case may be, unless that person is in privity with or adequately represented by a party over whom the court has jurisdiction.[4] To extend the judgment in violation of these principles and make it binding upon the person not before the court would constitute a denial of due process as to him.[5] Such a judgment is not, as to him, entitled to full faith and credit.[6] And if he is an indispensable party and not before the court, any party who is before the court and who would be adversely affected by the court's judgment has such a direct and substantial interest in the outcome that he can raise the issue of indispensability and the court's lack of jurisdiction over the indispensable party.[7] Indeed, the lack of an indispensable party is so basic that it can and should be raised by the trial or appellate court on its own motion.[8]

[3]—Classification of Parties a Federal Matter.

The classification of parties [1] is a federal matter.[2]

In summary of matter and principles elaborated elsewhere, the

[3] (1958) 357 US 235, 78 S Ct 1228, 2 L ed2d 1283 (see ¶ 4.25[4], *supra;* ¶ 19.08, *infra*), noted (1959) 11 Stan L Rev 344, 44 Cornell LQ 409, 72 Harv L Rev 695.

[4] ¶¶ 0.405[4], 0.406, *supra;* ¶¶ 55.09, 60.41, *infra.*

As to privity, see ¶ 0.411, *supra;* and non-party participating in litigation, see ¶ 0.411[6], *supra.*

[5] Hansberry v. Lee (1940) 311 US 32, 61 S Ct 115, 85 L ed 22, 132 ALR 741 (see ¶ 0.406[2], *supra*); Hanson v. Denckla, *supra,* n 3.

[6] Western Union Telegraph Co. v. Commonwealth of Pennsylvania, *supra,* n 2; Hanson v. Denckla, *supra,* n 3.

[7] ¶¶ 19.05[2], 19.19, *infra*; Hanson v. Denckla, *supra,* n 3; Western Union Telegraph Co. v. Commonwealth of Pennsylvania, *supra,* n 2.

[8] ¶¶ 19.05[2], 19.19, *infra;* Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co. (CA3d, 1966) 365 F2d 802, 10 FR Serv2d 19a.1, Case 11.

[1] ¶ 19.02, *infra.*

See also ¶ 19.03, *infra,* dealing with realignment of parties.

[2] ¶ 19.07[1], *infra.*

reasons are these. Since the inception of the federal judicial system the classification of parties and the problem of compulsory joinder have been treated as a federal matter.[3] This treatment is proper since the classification of parties is intertwined with due process and fair judicial administration,[4] a number of Federal Rules, and with principles of federal jurisdiction, service of process, and venue.[5]

[4]—Relationship to Substantive Law and to Erie-Tompkins.

Some have characterized the indispensable party doctrine as substantive.[1] With deference, we would characterize it otherwise, although the difference between the "substantive" classification and ours may be largely semantic.

Substantive law, federal or state, as the case may be, will determine the rights and interests of the parties before the court, their interrelationship, and the relationship of those rights and interests to those of persons not before the court. Those substantive rights, interests and relationships evaluated,[2] the court then must determine in the light of procedural due process, fair judicial administration,[3] and the criteria set forth in Rule 19 whether it can proceed with the parties before the court or whether there is an indispensable party that is not before the court. In the latter event, unless he can be and is made a party, the action should be dismissed.[4]

If the non-joined party is dispensable, i.e., a necessary but not

[3] ¶ 19.01-1[1], *supra;* ¶ 19.19, *infra.*

[4] ¶ 19.01-1[2], *supra.*

[5] ¶¶ 19.04, 19.07[1], *infra.*

[1] Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co. (CA3d, 1966) 365 F2d 802, 10 FR Serv2d 19a.1, Case 11.

See also Stevens v. Loomis (CA1st, 1964) 334 F2d 775, 778, n 7 (referring to the proposed revision of Rule 19 contained in the Preliminary Draft of 1964; as to that Draft, see ¶ 19.01 [4], *supra*).

[2] Evaluated, not determined on the merits. For a court cannot transform an indispensable party into a dispensable party by determining in advance that it would decide the claim on the merits in such a way that it would not affect him. Hilton v. Atlantic Refining Co. (CA5th, 1964) 327 F2d 217.

[3] ¶ 19.01-1[2], *supra.*

[4] ¶ 19.01-1[2], *supra;* ¶¶ 19.05[2], 19.19, *infra;* Shields v. Barrow (1854) 17 How 130, 15 L ed 158; Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., *supra,* n 1.

[2]—Raising Issue as to Lack of Indispensable Party.

Failure to join conditionally necessary parties is treated elsewhere.[1] But it is appropriate at this time to take account of the non-joinder of an indispensable party. Where federal jurisdiction is predicated upon the character of the parties, as in diversity and alienage, the failure to join a party has a direct bearing on jurisdiction. If the non-joined party is only a conditionally necessary party and his joinder would destroy diversity, revised Rule 19 authorizes the court to proceed without him.[2] If the necessary party has been originally joined, but his presence would defeat jurisdiction, the court in the exercise of a sound discretion can under Rule 21 permit him to be dropped.[3] In each of these situations the court can proceed to render an equitable judgment without his presence. Not so in the case of the indispensable party. His presence is required in order that the court may make an adjudication equitable to all persons involved.[4] Hence in diversity and alienage cases, the concept of indispensability

[1] ¶¶ 19.07-1[0], 19.19, *infra.*

See also ¶¶ 19.01-1[6], 19.04, *supra.*

[2] ¶¶ 19.07, 19.07-1, 19.07-2, *infra.*

Under original Rule 19, even though the court could proceed without the presence of a conditionally necessary party, it could, in the exercise of a sound discretion, dismiss the suit. And in some situations it would be an abuse not to do so. Stevens v. Loomis (CA1st, 1964) 334 F2d 775. Although the matter is not free from doubt under revised Rule 19, we believe that the discretionary power should continue. ¶¶ 19.07-1[4], 19.07-2[0], 19.19, *infra.*

[3] Girardi v. Lipsett, Inc. (CA3d, 1960) 275 F2d 492, 494 n 1, cert den (1960) 364 US 821, 81 S Ct 56, 5 L ed2d 50 ("a federal court may drop nondiverse defendants and retain jurisdiction over the case where those dropped defendants are not indispensable parties"); Kerr v. Compagnie de Ultramar (CA2d, 1958) 250 F2d 860, 863, 25 FR Serv 19b.322, Case 2 ("It has long been established that a federal court, on motion of the plaintiff, may drop a non-diverse defendant and retain jurisdiction if that party is not indispensable."); Weaver v. Marcus (CCA4th, 1948) 165 F2d 862, 11 FR Serv 21.115, Case 1 (set out in ¶ 19.11, *infra*); Padbury v. Dairymen's League Coop Ass'n (MD Pa 1954) 15 FRD 484, 19 FR Serv 19b.322, Case 2 (Action to recover on fire policy where defendant moved to dismiss for lack of jurisdiction; the court held that the jurisdictional defect could be cured by dropping non-diverse defendant.).

See also ¶ 21.03, *infra.*

[4] ¶¶ 19.07, 19.07-2, *infra.*

Disclaimer of interest by indispensable party permits the action to proceed. ¶ 19.03[1], *supra.*

has a direct bearing on jurisdiction.[5] If the citizenship of an indispensable party, who is omitted or joined, is the same as that of an adverse party, it can be viewed as ousting the court of jurisdiction.[6]

[5] Calcote v. Texas Pac. Coal & Oil Co. (CCA5th, 1946) 157 F2d 216, 218, 167 ALR 413, 9 FR Serv 19a.1, Case 2, citing Treatise ("In diversity cases, the question of indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action. Jurisdictional questions come first in the orderly disposition of a case. A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained. The same limitation would restrict review on appeal, even on certiorari, and no one could tell whether the court had jurisdiction until it had determined the merits of the controversy."), cert den (1946) 329 US 782, 67 S Ct 205, 91 L ed 671, commented on in (1947) 56 Yale LJ 1088, 21 Tul L Rev 486. The commentator in the Yale Law Journal criticizes the court's position that indispensability should be decided before looking to the merits as at odds with the purpose of Rule 19. It is urged that, since the Rule makes the determination of indispensable parties an exercise of the court's discretion, the court, in close cases, should defer determination of whether an absent party whose presence would oust jurisdiction was indispensable until a determination of the merits made it clear whether a decree could be entered without injuring the interested party who was absent, i.e., a hearing on the merits might disclose that the absent party is only necessary.

See in accord with Calcote, *supra*, Fitzgerald v. Jandreau (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing Treatise ("The absence of an indispensable party precludes the court from proceeding with a case. [citations] For, in a diversity of citizenship cases [sic], such as this case is, it is impossible to determine whether the necessary diversity exists unless all indispensable parties are before the court and the citizenship of each is a matter of record."); Bentinck v. Guaranty Trust Co. (SD NY 1952) 109 F Supp 827, 828.

See also ¶¶ 19.01-1[3], 19.03, 19.04 [2], *supra*.

[6] Minnis v. Southern Pac. Co. (CCA9th, 1938) 98 F2d 913; Gaw v. Higham (CA6th, 1959) 267 F2d 355, 2 FR Serv2d 19a.1, Case 5, cert den (1959) 360 US 933, 79 S Ct 1453, 3 L ed 1546; McCormick v. Tipton (CA6th, 1958) 259 F2d 913, 1 FR Serv2d 19a.1, Case 8; Clinton v. International Organization of Masters, Mates & Pilots of Am., Inc., (CA9th, 1958) 254 F2d 370, 25 FR Serv 19b.322, Case 4; Hood v. James (CA5th, 1958) 256 F2d 895, 1 FR Serv2d 19a.1, Case 9; Underwood v. Maloney (CA3d, 1958) 256 F2d 334, 25 FR Serv 17b.32, Case 1; Baten v. Nona-Fletcher Mineral Co. (CA5th, 1952) 198 F2d 629, cert den (1952) 344 US 864, 73 S Ct 104, 97 L ed 670; Young v. Powell (CA5th, 1950) 179 F2d 147, 13 FR Serv 19a.1, Case 5, cert den (1950) 339 US 948, 70 S Ct 804, 94 L ed 1362; Donaldson v.

But the concept of indispensability goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it.[7]

Werblow (ND Tex 1956) 140 F Supp 244, 22 FR Serv 19b.321, Case 1; Alden v. Central Power Elec. Coop., Inc. (D ND 1956) 137 F Supp 924, 22 FR Serv 13b.11, Case 1.

See also ¶ 19.03, *supra*.

We would prefer not to put the concept of indispensability on jurisdictional grounds. If the indispensable party is joined and his joinder destroys diversity, then so long as the case is in that posture the court lacks federal jurisdiction. If, however, he is dropped or not made a party, the court has technical federal jurisdiction; but for reasons subsequently stated in the text it cannot properly proceed. And see ¶ 19.07-2[0], *infra*.

[7] ¶ 19.01-1[2], *supra;* State of Washington v. United States (CCA 9th, 1936) 87 F2d 421, 427 ("The defect is not, properly speaking, a jurisdictional one. . . ." For analysis of indispensability as made by this case, see ¶ 19.07[1], *infra*); Warner v. First Nat'l Bank (CA8th, 1956) 236 F2d 853, 857, 858, 23 FR Serv 19a.1, Case 6, citing Treatise ("The issue of want of indispensable parties is not a jurisdictional one. . . . Ordinarily dismissal should not be ordered for failure to join an indispensable party, but an opportunity should be afforded to bring in such party."), cert den (1956) 352 US 927, 77 S Ct 226, 1 L ed2d 162; Boris v. Moore (ED Wis 1957) 152 F Supp 602, 608, 609, citing Treatise ("Failure to join an indispensable party does not oust the jurisdiction of the court in the action before it. But such failure does destroy the power of the court to grant any relief which would in any way affect an absent indispensable party."), aff'd (CA7th, 1958) 253 F2d 523; Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co. (CA9th, 1953) 202 F2d 944, 946, 18 FR Serv 19a.1, Case 13, quoting Treatise ("indispensability is not jurisdictional but is based on equity"), cert den (1953) 346 US 899, 74 S Ct 225, 98 L ed 151; Fitzgerald v. Jandreau (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing Treatise ("The absence of an indispensable party precludes the court from proceeding with a case."); Kohler v. McClellan (ED La 1948) 77 F Supp 308, 315, 11 FR Serv 19a.1, Case 3 (In holding that a shareholder's action must be dismissed because the corporation, an indispensable party, was not before the court, although its citizenship would not defeat jurisdiction, Judge Borah stated: "It is true that the question of indispensable parties is jurisdictional in diversity cases. However, we need not base our decision on lack of jurisdiction but may put it on a much broader ground. As was said in Mallow v. Hinde, 12 Wheat 193, 6 L ed 599: 'We do not put this case upon the ground of jurisdiction but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate

In this situation, barring exceptional equities,[8] it should not proceed without his joinder, even though his citizenship would not destroy jurisdiction in the cases of diversity and alienage, or although it is immaterial, as when jurisdiction is based on the character of the subject matter—a federal question.[9]

directly upon a person's rights without the party being either actually or constructively before the court.'").

See also ¶ 19.19, *infra*.

[8] Benger Laboratories Ltd. v. R. K. Laros Co. (ED Pa 1960) 24 FRD 450, 452, 2 FR Serv2d 12h.22, Case 1 ("In my opinion, dismissal is not automatic under the Federal Rules upon a showing that an indispensable party has not been joined. This is so in spite of the fact that this defense is based upon a defect considered to be on a par with lack of jurisdiction over subject matter and failure to state a claim or legal defense to the extent that it can be raised by the parties at any time during the proceedings. F.R.Civ.P. rule 12(h) cannot be interpreted to mean that a party with the necessary information to make a motion for joinder of an indispensable party can sit back and raise it at any point in the proceedings, when the only effect of the motion under the circumstances would be to protect himself and not the person alleged to be indispensable. Such an interpretation would violate the direction of F.R. Civ.P. rule 1 that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'"), aff'd (CA3d, 1963) 317 F2d 455, cert den (1963) 375 US 833, 84 S Ct 69, 11 L ed2d 64; Parker Rust-Proof Co. v. Western Union Telegraph Co. (CCA2d, 1939) 105 F2d 976 (holding that the court had power to proceed without joinder of an indispensable party because of the latter's inequitable conduct), noted in (1940) 24 Minn L Rev 705, cert den (1939) 308 US 597, 60 S Ct 128, 132, 84 L ed 500. Since this was a suit to obtain the issuance of a patent, see ¶ 19.14[3], *infra*, the non-joinder of the "indispensable" party did not affect federal jurisdiction.

Cf. Klumb v. Roach (CCA7th, 1945) 151 F2d 374 (This was a similar type of proceeding. *T*, who held a half-interest, by recorded assignment of which plaintiff had notice, in defendant *R*'s application for a patent and opposition proceedings to plaintiff's application for a patent, held to be an indispensable party to plaintiff's action against *R*. And the fact that *T* was *R*'s attorney did not afford sufficient equitable grounds to dispense with his joinder.), cert den (1946) 327 US 784, 66 S Ct 684, 90 L ed 1011.

See n 11, *infra*.

Disclaimer of interest by indispensable party. See ¶ 19.03[1], *supra*.

[9] See, *e.g.*, United States v. Fried (ED NY 1960) 183 F Supp 371, 3 FR Serv2d 19a.1, Case 2 (Action by government pursuant to 28 USC § 1345 to collect disability benefits under an insurance policy on the life of delinquent taxpayer. *Held;* beneficiary under the policy was an

¶ 19.07. General Analysis of Who Are Necessary and Indispensable Parties.

[1]—Principles Developed Prior to 1966 Revision.

In spite of the vast number of cases that have arisen concerning who are necessary and who are indispensable parties, the governing principles have remained comparatively simple and constant. Most often cited for these principles is the case of *Shields v. Barrow* in which Justice Curtis said:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. . . . Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. . . ."

are indispensable parties.[1] And Justice Curtis further said:

[1] Shields v. Barrow (1854) 17 How 130, 139, 15 L ed 158.

See also Williams v. Bankhead (1874) 19 Wall 563, 572, 22 L ed 184; Horn v. Lockhart (1873) 17 Wall 570, 21 L ed 657; Lumbermens Mut. Cas. Co. v. Elbert (1954) 348 US 48, 52, 75 S Ct 151, 99 L ed 59 (quoting last sentence of the quotation set forth in the text; and citing ¶ 19.07 *et seq.* of the Treatise; the *Elbert* case is discussed in ¶¶ 0.71 [4.—6], 0.77[4], *supra*).

The foregoing passage from the first edition of the Treatise is quoted in County of Platte v. New Amsterdam Cas. Co. (D Neb 1946) 9 FR Serv 19a.11, Case 1, 6 FRD 475, and in Firemen's Fund Ins. Co. v. Crandall Horse Co. (WD NY 1942) 47 F Supp 78, 6 FR Serv 19b.1, Case 2; Ducker v. Butler (App DC 1939) 104 F2d 236, citing Treatise; Winchester Electronics Corp. v. General Prods. Corp. (D Conn 1961) 198 F Supp 355, 358, 5 FR Serv 19a.1, Case 3, citing Treatise; MacBryde v. Burnett (D Md 1941) 41 F Supp 661, 5 FR Serv 19b.1, Case 2, citing Treatise.

And see Reid v. Reid (CA10th, 1959) 269 F2d 923, 926, 2 FR Serv2d 19a.1, Case 11; Order of R.R. Tel. v. New Orleans, T. & M. Ry. (CA5th, 1956) 229 F2d 59, 67, cert den (1956) 350 US 997, 76 S Ct 548, 100 L ed 861; Williams v. Pacific Royalty Co. (CA10th, 1957) 247 F2d 672, 675; Skelly Oil Co. v. Wickham (CA10th,

"To use the language of this court, in *Elmendorf v. Taylor,* 10 Wheat., 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another state,—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree." [2]

Parties have been held indispensable because their "rights are so entangled with one another that it is practically impossible in the decree to protect those that are absent." [3] In another case parties were held indispensable because the decree would be of "immediate concern" to them.[4] And because the relief sought in a bill could not possibly be effective without the joinder of an absent party, that party was held indispensable.[5] The fact that the final judgment rendered

1953) 202 F2d 442, 446; Metropolis Theatre Co. v. Barkhausen (CA7th, 1948) 170 F2d 481, 485, cert den (1949) 336 US 945, 69 S Ct 812, 93 L ed 1101; Wyoga Gas & Oil Corp. v. Schrack (MD Pa 1939) 27 F Supp 35, 1 FR Serv 19b.1, Case 1, aff'd on reargument 29 F Supp 582, 2 FR Serv 19b.312, Case 1; Rhoads v. National Iron Bank (ED Pa 1940) 35 F Supp 650; Kelley v. Queeney (WD NY 1941) 41 F Supp 1015; Stuff v. LaBudde Feed & Grain Co. (ED Wis 1941) 42 F Supp 493, 5 FR Serv 19b.312, Case 1; Koster v. (American) Lumbermens Mut. Cas. Co. (ED NY 1945) 8 FR Serv 19a.1, Case 6.

[2] Shields v. Barrow (1854) 17 How 130, 142, 15 L ed 158.

[3] Roos v. Texas Co. (CCA2d, 1927) 23 F2d 171, cert den (1928) 277 US 587, 48 S Ct 434, 72 L ed 1001.

See also Ingersoll v. Pearl Assur. Co. (ND Cal 1957) 153 F Supp 558 (in action to recover for fire loss, insurer's agent was found to be indispensable party defendant because plaintiff's claims against him were "so interwoven" with the claims against the insurer that complete adjudication of the parties' rights could not be had without his presence).

[4] State of Texas v. Interstate Commerce Comm'n (1921) 258 US 158, 42 S Ct 261, 66 L ed 531. The suit was brought by the state against the Interstate Commerce Commission to have its rulings on wages declared unconstitutional, and employers and employees who were operating under the rulings were held indispensable because the decree would be of "immediate concern" to them.

[5] Kendig v. Dean (1878) 97 US 423, 425, 24 L ed 1061. In a suit by a stockholder against X, who had fraudulently deleted the complainant's name from corporate books while X was in wrongful possession of them, for an order that the name be restored, *held* the corporation is an indispensable party, because X was powerless to comply with the decree if given. The court said, "The court would find itself in the position of

¶ 19.08. Actions Involving a Fund, a Trust, or an Estate.

Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.[1]

And this principle is applicable to an action involving a labor union or unions concerning the disposition of a fund, a trust, or an estate.[2]

[1] Russell v. Clark's Ex'rs (1812) 7 Cranch 69, 3 L ed 271; Williams v. Bankhead (1874) 19 Wall 563, 22 L ed 184.

Franz v. Buder (CCA8th, 1926) 11 F2d 854 (owner of life estate in personalty, consisting largely of corporate stock, which had been placed in hands of trustees to manage, and all other remaindermen or their heirs, *held* indispensable parties to suit by one of remaindermen against one of trustees for an accounting and to establish an interest in stock dividends received by trustee), cert den (1927) 273 US 756, 47 S Ct 459, 71 L ed 876; Ducker v. Butler (App DC 1939) 104 F2d 236 (Statute authorized payment out of appropriation made for lands taken from Indians, of fees and expenses for services rendered by attorneys or agents having approved contracts with such Indians, or assignments thereof. Estate of deceased assignee of interest in approved contract with Indians was "indispensable party" to suit for an apportionment to satisfy claim against fund.).

Metropolitan Life Ins. Co. v. Dumpson (SD NY 1961) 194 F Supp 9, 4 FR Serv2d 19a.1, Case 13, citing **Treatise** (insured in life insurance policy is indispensable to insurance company's interpleader action to determine claims to cash surrender value of the policy by insured's allegedly abandoned wife and the Commissioner of Welfare); Gentry v. Hibernia Bank (ND Cal 1957) 152 F Supp 469, 24 FR Serv 19a.1, Case 15 (action against 13 of 15 shareholders of bank to determine proprietary interests in assets of bank; *held* remaining 2 shareholders are indispensable).

See also ¶ 19.18[1], *infra*.

Exception is properly made where a judgment can be framed so that an absent party will not be prejudiced. ¶ 19.07-2[2], *supra*.

[2] ¶ 19.13[2], *infra*; Eads v. Sayen (CA7th, 1960) 281 F2d 791, 3 FR Serv2d 19a.1, Case 8; Fitzgerald v. Jandreau (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing **Treatise** ("One of the issues here is the right to possession and use of the funds and property of local 301. Where the purpose of the suit is the disposition of a fund, to which there are several claimants, all of the claimants are generally indispensable. . . . 3 Moore's Federal Practice, 2nd Ed. [¶ 19.08]." Local union is indispensable.); Fitzgerald v. Haynes (MD Pa 1956) 146 F Supp 735, 23 FR Serv 19a.1, Case 11, aff'd (CA3d, 1957) 241 F2d 417, 23 FR Serv 19a.1, Case 13; Fitzgerald v. Santoianni (D Conn 1950)

In a suit to impound a sum of money to which several partners are claimants, all partners are indispensable parties,[3] except that if one partner disclaims all interest in the partnership claim that partner is no longer an indispensable party.[4]

A bank which has a contractor's voucher for a specific sum of money is indispensable to a suit by the contractor's surety to restrain him from paying out the money.[5] But a contractor is not an indispensable party to an action by a materialman to recover funds paid by the contractor to a third party where the funds are required under state law to be held in "trust" for payments of plaintiff's claims.[6]

Conflicting claimants to the rights under an insurance policy are indispensable parties, if the action is to enjoin payment by the insurance company.[7] In an action by a bankrupt for disability insurance benefits accruing before bankruptcy but not listed as assets, the trustee in bankruptcy is an indispensable party.[8]

Claimants to a fund being administered by a state court must be regarded as indispensable to a suit by the United States for an accounting and delivery of the funds.[9] Creditors who have levied

95 F Supp 438, 15 FR Serv 19a.1, Case 3.

See also Hanson v. Hutchison (CA7th, 1954) 217 F2d 171, 20 FR Serv 19a.1, Case 5.

[3] Raphael v. Trask (CC SD NY 1902) 118 Fed 678.

For discussion of actions by and against partners, see ¶ 19.11, *infra*.

[4] Grant County Deposit Bank v. McCampbell (CA6th, 1952) 194 F2d 469, 16 FR Serv 19a.1, Case 11, 31 ALR2d 909 (see ¶ 19.03[1], *supra*).

[5] Garretson v. National Sur. Co. (CCA5th, 1933) 63 F2d 847.

[6] Gramatan-Sullivan, Inc. v. Koslow (CA2d, 1957) 240 F2d 523, 525, 23 FR Serv 19a.1, Case 12, per Judge Learned Hand: "It is clear that the contractor has no personal interest in the outcome of this action, because if the plaintiff succeeded, the payments made by the defendant would *pro tanto* reduce its debt to the plaintiff and would at most revive the defendant's claim against it, thus merely changing one creditor for another."

[7] Mahr v. Norwich Union Fire Ins. Co. (1891) 127 NY 452, 28 NE 391. This case refers to the parties as necessary. The term "necessary" in state cases corresponds to "indispensable" in federal cases.

Cf. New England Mut. Life Ins. Co. v. Brandenburg (SD NY 1948) 8 FRD 151, 11 FR Serv 19b.1, Case 5 (discussed in ¶ 19.10, *infra*).

[8] Crook v. Prudential Ins. Co. of Am. (WD Ky 1940) 34 F Supp 239, 3 FR Serv 17a.11, Case 2.

[9] United States v. Bank of New

Heirs and distributees, however, are not indispensable parties to suits by some of the heirs against an administrator to compel an accounting where the interests involved are severable,[24] by a distributee against the administrator and his surety on his bond,[25] or against the executor by one claiming to be an heir at law suing to establish an interest in the estate.[26] Nor are all heirs and distributees indispensable parties to a suit to construe a will brought against the trustee and representative adverse distributees.[27] And where one heir sues a second heir to set aside a deed of trust from decedent to the second heir on grounds of fraud and to declare the property or the proceeds therefrom vested in equal undivided shares among three heirs, the third heir is a necessary but not an indispensable party.[28]

The distinction in the estate cases, then, is whether the right involved in the suit is separate and divisible or whether it is indivisible: if separate and divisible, adjudication of that right can be had without affecting persons not concerned with that right and such persons are not indispensable;[29] if, however, the right is indivisible then all persons concerned with that right (or parties properly representing them) are indispensable to an action for its adjudication.[30]

The general rule is that in a suit to alter the terms of a trust in-

know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it, or their successors in interest are before the court.' ").

[24] Horn v. Lockhart (1873) 17 Wall 570, 21 L ed 657.

Otherwise if the interests are not severable. See Baird v. Peoples Bank & Trust Co. (CCA3d, 1941) 120 F2d 1001, 4 FR Serv 19a.1, Case 6, 136 ALR 693 (see ¶ 19.18[1], *infra*); Bland v. Fleeman (WD Ark 1887) 29 F 669.

[25] Payne v. Hook (1869) 7 Wall 425, 19 L ed 260.

[26] Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 215 US 33, 30 S Ct 10, 54 L ed 80.

[27] De Korwin v. First Nat'l Bank (CCA7th, 1946) 156 F2d 858, 9 FR Serv 19a.1, Case 3 (since certain of the named parties were not indispensable they could be dismissed to preserve federal jurisdiction), cert den (1946) 329 US 795, 67 S Ct 481, 91 L ed 680.

Cf. Hutchison v. Fulton, *supra*, n 22; Young v. Powell, *supra*, n 23.

[28] Blizzard v. Penley (D Colo 1960) 186 F Supp 746, 3 FR Serv2d 19a.1, Case 11 (and the court exercised its discretion to proceed where the joinder of the third heir would destroy diversity and an action in the state court may be barred by limitations).

[29] See, for example, n 13, *supra*.

[30] See, for example, n 23, *supra*.

strument or to declare the trust invalid all parties who would be affected by the adjudication are indispensable.[31] Relative to invalidity, in reviewing a state court judgment, Chief Justice Warren stated in *Hanson v. Denckla:*

> "Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy."[32]

Where rights in a trust are involved in an action by a beneficiary against the trustee, all beneficiaries whose interest in the estate will be affected must be before the court.[33] But where the beneficiaries' interests in the trust *res* are separate and distinct, they are not indispensable to an action by one beneficiary where relief can be granted without prejudice to the interests of the other beneficiaries.[34] And all the beneficiaries of a trust are not indispensable in an action to remove the trustee for misconduct.[35]

[31] ¶ 19.10, *infra.*

[32] Hanson v. Denckla (1958) 357 US 235, 245, 78 S Ct 1228, 2 L ed2d 1283 (see ¶¶ 4.25[4], 19.01-1[2], *supra*), noted (1959) 11 Stan L Rev 344, 44 Cornell LQ 409, 72 Harv L Rev 695.

[33] Matthies v. Seymour Mfg. Co., *supra,* n 19; Franz v. Buder, *supra,* n 1; and see Wood v. Honeyman (1946) 178 Ore 484, 169 P2d 131, 171 ALR 587.

For more elaboration, see ¶ 19.18 [1], *infra.*

[34] Clayton v. James B. Clow & Sons (ND Ill 1957) 154 F Supp 108, 25 FR Serv 56c.41, Case 4, citing Treatise (action by beneficiary seeking determination of his right in stock sold by life tenant and trustee plus restoration of the shares to the trust created by will; *held,* other persons interested in the stock need not be joined since the relief sought can be granted without prejudice to their interests).

Cf. Stevens v. Loomis, *supra,* n 19.

[35] Wesson v. Crain (CCA8th, 1948) 165 F2d 6, 11 FR Serv 19b.1, Case 1, set out in ¶ 19.13[1], *infra.*

Green v. Green (CA7th, 1954) 218 F2d 130, 20 FR Serv 19a.1, Case 7, cert den (1955) 349 US 917, 75 S Ct 606, 99 L ed 1250 (in action, by some beneficiaries against a trustee, based upon monies allegedly converted by the trustee in which an accounting, removal of the trustee and a money judgment were sought, a co-beneficiary, also the wife of the trustee, need not be joined since the relief asked would not prejudice her interests and she has indicated a position more akin to the trustee than to the beneficiaries); Booth v. Security Mut. Life Ins. Co. (D NJ 1957) 155 F Supp 755, 25 FR Serv 23a.2, Case 1 (class action by three members of local union as

Normally, the beneficiaries of a trust need not be joined in an action by the trustee against third persons, or vice versa, for he represents their interests and is a real party in interest plaintiff or defendant, as the case may be.[36] However, all beneficiaries who are entitled to a percentage of the net income from a trust must join in an action to recover for the wrongful taking of trust assets, where the trustee's interests are adverse or hostile to the cestuis, or he in bad faith refuses to sue on their behalf.[37]

A settlor of a trust, who was neither trustee nor beneficiary under the trust, is not an indispensable party to an action to set aside a supplemental trust agreement where the settlor did not stand to be deprived of any beneficial interest, nor receive a greater interest, depending on the outcome of the action.[38]

beneficiaries of trust fund against the trustee of the international union for breach of trust).

Meyerding v. Villaume (D Minn 1957) 20 FRD 151, 24 FR Serv 19a.1, Case 5 (action by one remainderman for accounting by the trustee and for his removal does not require joinder of other remaindermen).

Meyerding, *supra,* is questionable in permitting the action to go forward for an accounting without requiring joinder of the other remaindermen. See nn 19, 33, *supra.*

[36] Baker v. Dale (WD Mo 1954) 123 F Supp 364, 20 FR Serv 19a.1, Case 3 (unless there is a conflict of interest the trustees of a trust are the proper parties plaintiff and thus they must be joined in an action to recover for wrongful taking of trust assets); Olson v. Miller (CA DC 1959) 263 F2d 738, 1 FR Serv2d 19a.1, Case 12 (international union need not be joined in action by special trustee of local and secretary of the international for return of property, as its interests are adequately represented).

See also ¶¶ 17.07, 17.12, *supra;* ¶ 19.10, *infra.*

[37] See Baker v. Dale, *supra,* n 36 (applying Missouri law).

[38] Sax v. Sax (CA5th, 1961) 294 F2d 133, 4 FR Serv2d 19a.1, Case 12.

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